

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 196 of 1997
with
CIVIL APPLICATION No 4078 of 1997
with
APPEAL FROM ORDER No 396 of 1997
with
CIVIL APPLICATION No 7512 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

HITENDRA RAMBHAI PATEL

Versus

LOPABEN PATEL

Appearance:

1. Appeal from Order No. 196 of 1997
MR BR GUPTA for Appellant
MR KV SHELAT for Respondent
2. Appeal from Order No 396 of 1997
MR KV SHELAT for Appellant
MR BR GUPTA for Respondent

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 11/09/97

COMMON ORAL JUDGEMENT

Both these appeals are directed against the order dated March 21, 1997 passed by the City Civil Court, Ahmedabad below application ex. 16 filed by the petitioner-wife in H.M.P. No. 397 of 1993. With the consent of the learned counsel for the parties, both the appeals have been taken up for hearing for final disposal, and are being disposed of by this common judgment.

2. The marriage between the parties was solemnized under the Hindu Marriage Act, 1955 in November, 1992. Thereafter the petitioner-wife has filed H.M.P. No. 397 of 1993 for restitution of conjugal rights and husband has filed H.M.P. No. 145 of 1995 for divorce. During the pendency of her petition, the wife filed application ex.16 claiming interim maintenance for herself and for minor daughter of the parties at the rate of Rs. 25,000/- per month as an aggregate amount of interim maintenance for the wife and minor daughter, and also an amount of Rs. 10,000/- as the amount of costs of litigation. The application came to be filed on February 7, 1996.

3. After hearing the parties, the trial court has passed the order under appeal holding that the opponent's income was fixed at atleast Rs. 5,000/- per month and interim maintenance of Rs. 1,000/- is awarded to the wife and interim maintenance of Rs. 500/- is awarded to minor daughter. Both the amounts of interim maintenance are awarded from the date of filing of the petition, i.e. November, 1993. The trial court has also awarded Rs. 3,500/- as the expenses of the litigation in favour of the petitioner-wife.

4. Appeal From Order No. 196 of 1997 is filed by the husband for challenging the order of interim maintenance awarded to the wife as well as to the minor daughter. Appeal From Order No. 396 of 1997 is filed by the wife for enhancement of the amounts of interim maintenance.

5. At the hearing of the appeals today, Mr. Gupta, learned counsel for the opponent-husband has urged the following contentions:-

- (i) The trial court could not have awarded any interim maintenance in favour of the minor daughter. The court has purported to have passed the order under appeal under the provisions of section 24 of the Hindu Marriage Act (hereinafter

referred to as " the Act"), but under the said provisions, the court has power to award interim maintenance only to the wife, i.e. to the spouse and not to the minor children. Hence, the trial court erred in awarding interim maintenance to the minor daughter.

(ii) The trial court has erred in fixing the income of the husband at Rs. 5,000/- per month when there was no evidence on record to show that the husband was earning any income.

(iii) In any view of the matter, the trial court could not have awarded interim maintenance from any date prior to the date of filing application ex. 16. Application ex. 16 was filed on February 7, 1996 whereas interim maintenance is awarded to the wife as well as to the minor daughter w.e.f. from the date of filing of the petition, i.e. November 9, 1993.

6. On the other hand, Mr. K.V. Shelat, learned counsel for the petitioner-wife has made the following submissions:-

(i) The trial court has already found that the respondent is staying with his parents and brother and they are having a family business and therefore, the income of the husband must be assessed at much more than Rs. 5,000/- per month.

(ii) The trial court ought to have awarded at least Rs. 3,500/- per month as interim maintenance to the wife and Rs. 1,500/- per month as interim maintenance to the minor daughter. The petitioner-wife and the minor daughter reserve their right to claim higher amounts of maintenance at the time of final disposal of the above petition/s since the husband is having substantial income which would justify a much higher amount of maintenance than is being claimed in the present interim application.

(iii) Lastly, Mr. Shelat supported the order insofar as the trial court has awarded interim maintenance from the date of filing of the petition.

7. As far as the contention of Mr. Gupta that the trial court could not have awarded interim maintenance to

the minor daughter, the same is thoroughly misconceived. It is true that the trial court has referred to the provisions of section 24 of the Hindu Marriage Act, but application ex. 16 filed by the wife claiming interim maintenance for herself as well as for minor daughter does not purport to be an application under section 24 of the Act. In fact, section 26 of the Act specifically empowers the court to pass such interim orders as it may deem just and proper with respect to the custody, maintenance and education of minor children in any proceedings under the Act. In view of the aforesaid express statutory provision empowering the court to pass orders for interim maintenance in favour of minor children, I have no hesitation in rejecting the contention of Mr. Gupta.

Mr. Gupta has, however, relied upon a decision of the Orissa High Court in the case of Purshottam Das Agarwala in AIR 1982 page 270 holding that in an application under section 24 of the Act, the court has no power to award interim maintenance in favour of minor children.

As already stated above, the application did not purport to be an application merely under section 24 of the Act. Even otherwise, once the express provisions, of section 26 of the Act confer power on the Court to award interim maintenance to minor children, in an application for interim maintenance filed by the wife, the Court has power to grant interim maintenance not only to the wife but also for the children, although there may not be a separate application under section 26 of the Act. This Court sees no need for two separate applications - one by the wife for herself and the other by the wife for the minor children, when maintenance is being claimed from the same respondent. Same view is taken by the Calcutta High Court in *Monoj Kr.Jaiswal v. Smt. Lila Jaiswal* reported in AIR 1987 Calcutta, 230, Rajasthan High Court in *Baboolal vs. Premlata* and another reported in AIR 1974 Raj. 93 and by Karnataka High Court in *Dr. D. Thimappa vs. N. Nagveni* AIR 1976, Karnataka 215 and by many other High Courts. Even the Orissa High Court itself has subsequently taken this view in *Mahendra Kumar vs. Snehlata* AIR 1983 Orissa Page 74.

8. As far as contention of Mr. Gupta regarding the income of the husband is concerned, it is true that all throughout the husband has been contending that he has no source of income of his own as he is neither employed anywhere nor does he have his own business. However, the trial court has found that the husband is residing with

his parents as well as brother at Ghatkopar in Mumbai and that they are running a family business in Mumbai. The trial court has, therefore, assessed the husband's income at atleast Rs. 5,000/- per month. The said assessment cannot be said to be unreasonable. If at all, there is any error committed by the trial court, it is in making the assessment on the lower side. There is, therefore, some substance in the grievance made by Mr. Shelat for the wife that the amount of Rs. 1,000/- awarded as interim maintenance to the wife and Rs. 500/- as interim maintenance to the minor daughter is too meagre to maintain themselves in these days. The minor daughter has also started going to school from June, 1995 and is studying in an English Medium school. In view of the facts and circumstances of the case and the income of husband, it appears to the Court to be just and proper to award an amount of Rs. 1500/- per month as interim maintenance to the wife and Rs. 1000/- per month as interim maintenance to minor daughter.

9. The last contention urged by Mr. Gupta is that in any view of the matter, the trial court could not have awarded any maintenance for any period prior to the date of filing of application ex. 16 as the trial court has no power to award any such interim maintenance prior to the date of application for interim maintenance.

In support of his aforesaid contention Mr. Gupta has relied upon a decision of Punjab & Haryana High Court in the case of Nirmala Devi v. Ram Dass reported in AIR 1973 Punjab & Haryana, 48 particularly on the observation made in para 4 of the judgment which reads as under:-

"4. The learned counsel for the appellant has not been able to cite any authority in support of his argument that the trial Court has not taken the correct view in the matter. As observed by a Single Bench of this Court in Dr. Yoginder Pal Soni vs. Smt. Padma Soni, (1970) 72 Punj LR 878, the main object underlying Section 24 is that neither party may suffer his or her inability to conduct the proceedings for want of money or expenses. According to this ruling, maintenance pendente lite should be granted from the date of the filing of the application under Section 24 of the Act. The appellant had claimed interim maintenance from the date on which the notice had been served on her. The necessity for passing any interim orders would come to an end with the termination of the main proceedings and there would be no question of the appellant

trying to defend any proceedings after her adversary had withdrawn from the contest. There would hardly be any occasion for making an interim provision for the defence of a case that had already concluded."

10. In the aforesaid para, it is clearly observed by the High Court that necessity for passing any interim order would come to an end with termination of the main proceedings and there would be no question of the appellant trying to defend any proceedings after her adversary had withdrawn from the contest. There would hardly be any occasion for making an interim provision for the defence of a case that had already concluded. The observation can obviously not apply to the facts of the present case as the proceedings had commenced in November, 1993 and are still pending. As stated above, the decision itself recognizes that, the object under section 24 is that neither party should suffer by his or her inability to conduct the proceedings for want of money or expenses. Mr.Gupta's submission ignores the express provision of section 24 as well as section 26 of the Act which empower the Court to award maintenance pendente lite to the spouse and also to pass such interim orders which appear to the Court to be just and proper, inter alia, with respect to the maintenance of minor children. Obviously, during the pendency of the proceedings, the wife has to maintain herself and the minor daughter. The opponent-husband cannot therefore, be absolved from his liability to maintain the wife and the minor daughter during pendency of the proceedings.

In principle, it should make no difference whether the application for interim maintenance is made alongwith the main petition or thereafter but prior to the conclusion of the proceedings. It is quite common in our society that after the wife is driven out from, or is compelled to walk out of, the matrimonial home, she alongwith minor children would go back to her parents or brother who may maintain her and the minor children without any legal obligation to do so and, therefore, the wife may not always file the application for interim maintenance alongwith the main petition. Sometimes the wife may initially even hesitate to make any monetary demand from the estranged husband lest it should come in the way of a possible reconciliation and reunion. Hence, such delay cannot deprive her and the minor children of their right to get interim maintenance, if they have no source of income of their own for supporting them. At the most, the timegap between the date of filing the petition and the application for interim maintenance may

assume relevance for examining the question, if any, whether the wife has a source of income of her own.

11. It is not disputed that the petitioner-wife is not employed anywhere and that she has no source of income for herself or for the minor daughter, who has also started going to school from June, 1995 and therefore, the trial court was justified in awarding interim maintenance from the date of filing of the Petition in November, 1993. Even while enhancing the amount of interim maintenance in favour of the minor daughter as per this order from Rs. 500/- to Rs. 1000/- per month, the said increase shall be effective from June, 1995 when the minor daughter started going to school.

12. In the result, Appeal From Order No. 196 of 1997 is dismissed. Appeal From Order No. 396 of 1996 is partly allowed to the following extent:-

(i) The opponent-husband shall pay the petitioner-wife interim maintenance at the rate of Rs. 1500/- (Rupees One Thousand Five Hundred) per month from the date of filing of H.M.P. No. 397 of 1993 till the date of disposal of the petition.

(ii) The opponent shall pay towards interim maintenance for the minor daughter at the rate of Rs. 500/(Rupees Five Hundred) per month w.e.f. the date of filing of H.M.P. No. 397 of 1993 till May, 1995 and thereafter at the rate of Rs. 1000/- (One Thousand) per month from June, 1995 till the date of disposal of the petition.

(iii) The arrears of interim maintenance payable by the opponent-husband at the aforesaid rates shall be paid to the petitioner-wife for herself and for the minor daughter, within four weeks from today.

(iv) It is clarified that the amount of Rs. 15000/(Rupees Fifteen Thousand) paid by the opponent-husband to the petitioner-wife in two instalments during pendency of the present appeal, shall be adjusted against the dues payable by the opponent to the wife and minor daughter under this order.

13. Both the appeals as also the Civil Application stand disposed in terms of the aforesaid directions.

14. The trial court shall hear both the petitions as expeditiously as possible.

15. At this stage, Mr. Gupta learned counsel for the opponent-husband prays for stay of operation of this order so that the opponent can have further recourse in accordance with law. Since four weeks' time is already granted for paying the arrears of interim maintenance, there is no need to stay the operation of this order.

Amp/-